



OFFICE OF THE DEPUTY COMMISSIONER - LEGAL MATTERS

LEGAL BUREAU BULLETIN

Vol. 48, No. 6

October 2018

I. SUBJECT: RETENTION AND DISSEMINATION OF RECORDS

II. INTRODUCTION

This Legal Bureau Bulletin updates the subject matter of Retention and Dissemination of Records to reflect the “Raise the Age” legislation, which became effective October 1, 2018.

A. Summary

The purpose of this Bulletin is to provide an overview of the law and Department guidelines governing the retention and dissemination of records pertaining to:

- (1) Juvenile Delinquents;
- (2) Juvenile Offenders;
- (3) Adolescent Offenders;
- (4) Subjects of Juvenile Reports; and
- (5) Adult arrestees.¹

B. Definitions

For the purposes of this Bulletin, the following terms are defined accordingly:

- (1) **Confidential:** Confidential records must be kept:
 - (a) in the exclusive possession of the Department; **and**

¹ For a quick reference guide to the principles discussed in this Bulletin, refer to the chart attached as Appendix A.

- (b) separate and apart from the files of adults.
- (2) **Destroyed:** Records that must be destroyed shall not be retained by the Department or any MOS **in either paper or electronic form.**
 - (3) **Sealed:** Sealed records are **not** destroyed; rather, the Department may retain custody of sealed records. Sealed records **shall not** be made available to any person or any public or private agency. **In limited circumstances**, sealed records may be made available to individuals outside of the Department including, for example, pursuant to a court order or pursuant to a request by the arrestee or his or her attorney.
 - (4) **Juvenile Delinquent:** A person over seven years of age and less than 17 years of age who commits an act that would constitute a crime if committed by an adult.² Charges brought against Juvenile Delinquents are adjudicated in Family Court.
 - (5) **Juvenile Offender:** A person aged thirteen to fifteen years of age whose criminal charges are adjudicated in Criminal Court. Generally, juveniles who are charged with specified felonies set forth in the Criminal Procedure Law will be treated as Juvenile Offenders.³ Beginning October 1, 2018, Juvenile Offender cases are tried in a new Youth Part. A Juvenile Offender conviction is considered an adult conviction.
 - (6) **Adolescent Offender:** A person aged sixteen years of age who is charged with a felony, committed on or after October 1, 2018.⁴ Felony charges brought against Adolescent Offenders are adjudicated in a new Youth Part.
 - (7) **Juvenile Report:** An internal department record documenting an act committed by a juvenile at least seven years of age but less than seventeen years of age that is illegal and/or may endanger the health or safety of the juvenile.
 - (8) **Adjudication:** A formal finding issued by the Family Court after a **juvenile delinquency** hearing. Adjudications are not considered convictions. Adjudications can be either **against or in favor of** a Juvenile Delinquent.

C. Juvenile Delinquency Records

The Family Court Act dictates the manner in which the Department must handle records pertaining to the arrests of Juvenile Delinquents. All Juvenile Delinquency records must be kept confidential. However, in some instances the records must be sealed or destroyed. The manner in which MOS treat these records depends on a variety of factors, including, but not limited to,

² See N.Y. Fam. Ct. Act § 302.2(1). Effective October 1, 2019, juvenile delinquents will be defined as persons over seven years of age and less than 18 years of age.

³ Penal Law § 10.00(18) and Criminal Procedure Law § 1.20(44) list the offenses that would warrant a juvenile to be charged as a Juvenile Offender, as opposed to a Juvenile Delinquent.

⁴ The legislation that creates this category of offenders became effective October 1, 2018 (the “Raise the Age Legislation”). Note that, effective October 1, 2019, persons aged seventeen years of age who commit a felony will also be considered Adolescent Offenders.

the disposition of the underlying charges and the types of records in Department custody. The relevant provisions of the Family Court Act are discussed below:

1. Fingerprints

Family Court Act § 306.1 provides that fingerprints taken of **Juveniles Delinquents** charged with **certain felonies**⁵ must be forwarded to the New York State Division of Criminal Justice Services (“DCJS”) via LiveScan. The Department **must not** retain **any copies** of the prints sent to DCJS.⁶

2. Photographs Taken During Arrest Processing

a. All Juvenile Delinquents

Family Court Act § 306.1(2) provides that, where fingerprints must be taken of a Juvenile Delinquent pursuant to Section 306.1(1), an arrest photograph of the Juvenile Delinquent may also be taken. **Arrest photographs** taken pursuant to Section 306.1(2) **and any other photographs** taken during arrest processing must be kept **confidential**.⁷ Therefore, MOS may not create wanted posters featuring Juvenile Delinquent arrest photographs for view by **anyone** outside of the Department, such as wanted posters displayed in public areas of precincts or other Department facilities, including areas of precincts that may from time-to-time be accessed by non-MOS. Additionally, wanted posters featuring Juvenile Delinquent arrest photographs may never be posted on social media. It should be noted that it is permissible to use Juvenile Delinquent photographs in photo arrays.⁸

b. Juvenile Delinquents Adjudicated for Certain Felonies

Family Court Act § 354.1(7) provides that if a juvenile is adjudicated a Juvenile Delinquent for **certain felonies**,⁹ then at the **age of 21, all photographs must** be destroyed immediately unless the Juvenile Delinquent has any criminal convictions.

3. Juvenile Delinquent Records Other Than Fingerprints and Arrest Photographs

Family Court Act § 375.1 dictates how records are treated after the termination of a juvenile delinquency proceeding **in favor of** the juvenile.¹⁰ This section of the Family Court Act is broader than the aforementioned provisions in that it addresses **all records** pertaining to a juvenile delinquency proceeding (e.g. arrest reports, complaint reports, or booking sheets), and

⁵ Specifically, § 306.1 refers to A and B felonies committed by 11 and 12 year-olds and all felonies committed by 13, 14, and 15 year olds.

⁶ See N.Y. Fam. Ct. Act § 306.1(4).

⁷ Id.

⁸ Consult Detective Guide Procedure No. 505-04 for guidance on the proper creation and administration of photo arrays using juvenile delinquent arrest photographs.

⁹ Specifically, § 354.1(7) applies to 11 and 12 year-olds who have committed A and B felonies.

¹⁰ Delinquency proceedings terminate in favor of the juvenile where the charges are, for example, dismissed or withdrawn.

not simply photographs and fingerprints. Specifically, Section 375.1(1) provides that, upon termination **in favor of** the Juvenile Delinquent, arrest records in connection with the proceeding **must be sealed**, and are then only to be made available to the Respondent and/or his agent (e.g. his parent, his guardian, or his attorney). Sealed records **must not be shared with anyone**, including members of the District Attorney's Office and other prosecuting agencies, the Office of the Corporation Counsel, the Civilian Complaint Review Board, and other investigatory agencies, whether pursuant to subpoena, Freedom of Information Law request, or otherwise.

D. Subjects of Juvenile Reports

The **Cuevas** Consent Decree limits the following:

- (1) The Department's ability to **share** Juvenile Reports and related documents with outside agencies;
- (2) The Department's internal ability to **access** Juvenile Reports and related documents; and
- (3) The Department's authority to **retain** Juvenile Reports and related documents.¹¹

The relevant provisions of the Consent Decree are memorialized in Patrol Guide Procedure No. 215-08. The Consent Decree dictates the following regarding the dissemination and destruction of **Juvenile Reports**:

1. Access and Sharing of Juvenile Reports and Associated Documents

The Consent Decree provides that Juvenile Reports and all associated documents, may not be made available to any public or private body or agency or to any official or employee thereof, except to:

- (1) The Juvenile Desk;
- (2) The Detective Bureau **in connection with** an investigation; and
- (3) Desk Officers **when exercising discretion to arrest or not arrest a juvenile**.

2. Retention of Juvenile Reports and Associated Documents

Juvenile Reports and associated records must be destroyed in the following circumstances:

- (1) When the subject juvenile has reached his or her **seventeenth** birthday; or
- (2) If a follow-up investigation determines that the allegations underlying a Juvenile Report are **unfounded**.¹²

¹¹ The Consent Decree stemmed from the litigation of Cuevas v. Leary, 70 CV 20 (S.D.N.Y. 1972).

Accordingly, officers who prepare or review Juvenile Reports and related documentation **must** ensure that possession, retention, or reference to such documents does not violate the Consent Decree. Officers are encouraged to refer to Patrol Guide Procedure No. 215-08 to aid in their compliance with the Consent Decree.

E. Juvenile Offender and Adolescent Offender Records

Criminal Procedure Law (“CPL”) § 160.50 governs the Department’s retention and dissemination of Juvenile Offender records. It is important to note that Adolescent Offender and Juvenile Offender cases can be transferred to Family Court if certain conditions are met. If such transfer occurs, the rules about Juvenile Delinquency records apply. When a Juvenile Offender’s or Adolescent Offender’s case is prosecuted in the Youth Part, CPL § 160.50 provides that, upon the termination of a criminal action **in favor of** the accused, the following occurs:

- (1) The record of such criminal action (e.g. arrest reports, complaint reports, DD-5s) becomes **sealed**; and
- (2) Fingerprints and arrest photographs related to such criminal action **must** be **destroyed**.¹³

Upon the sealing of an arrest, such sealed records may not be made available to any person or public or private agency, except in very limited circumstances, such as to the accused and his designated agent (e.g. his or her attorney) or to an outside law enforcement or government agency with a court order or signed release.

F. Adult Criminal Records

CPL § 160.50 governs the Department’s retention and dissemination of adult arrest records that become sealed. Adult arrest records may become sealed in a variety of circumstances, including dismissal of an action by the criminal court or the District Attorney’s Office, a not guilty verdict at trial, or a conviction for a non-criminal offense. The purpose of § 160.50 is to return the arrestee to the position he or she occupied prior to his or her arrest; in other words, the statute renders the sealed arrest a nullity so that the arrestee may, for example, apply for employment, a mortgage, or other benefits. Access to such records is highly restricted and may only be made available in very limited circumstances, such as to the accused and/or agent (e.g. his or her attorney), to the Department’s License Division, and to the Departments of Probation or Parole if the arrest is relevant to his or her supervised release. Further, such records and/or information contained therein must not be released to the press, including in press releases or in statements to the media.

¹² Patrol Guide Procedure No. 215-08 summarizes these provisions of the Consent Decree and states that “[t]he On-Line Juvenile Report System will purge all data regarding **COMPLAINT REPORT WORKSHEETS** and **JUVENILE REPORT SYSTEM WORKSHEETS** from Department databases, for youths who have reached their seventeenth birthday and for all “unfounded,” “unsubstantiated,” and “complaint withdrawn” cases as required by “Cuevas v. Leary,” and that Commanding Officers will ensure that such purges are effected.

¹³ CPL § 160.50(1)(a).

III. CONCLUSION

Members of the Service must comply with rules pertaining to the retention and dissemination of Juvenile, and criminal records. MOS are encouraged to contact the Legal Bureau at (646) 610-5400 if he or she is uncertain as to whether the law permits the MOS to retain or disclose the records at issue.

Legal Bureau Bulletin Volume 48 No 4 dated June 2018 is revoked

Appendix A

	Fingerprints	Photographs	Other Records
<u>Adults</u> (the “accused”) 17 years old and up (beginning 10/1/18) 18 years old and up (beginning 10/1/19)	When a case ends <u>in favor of the accused</u> or <u>results in a non-felony adjudication</u> , all fingerprints must be DESTROYED .	When a case ends <u>in favor of the accused</u> or <u>results in a non-felony adjudication</u>, all photographs must be DESTROYED.	- When a case ends <u>in favor of the accused</u>, all records must be SEALED rather than destroyed. - Sealed records <u>should not</u> be shared with <u>anyone</u> outside the Department (e.g., prosecutors & the media), except in statutorily limited circumstances. For further direction, contact the Legal Bureau.
<u>Juvenile Offenders</u> (“JO”) 13 through 15 years old - Offense: Certain felonies <u>Adolescent Offenders</u> (“AO”) 16 years old <u>only</u> (beginning 10/1/18) 17 years old <u>only</u> (beginning 10/1/19) - Offense: All felonies	When a case ends <u>in favor of the JO/AO</u> , all fingerprints must be DESTROYED .	When a case ends <u>in favor of the JO/AO</u> , all photographs must be DESTROYED .	- When a case ends <u>in favor of the JO/AO</u>, all records must be SEALED rather than destroyed. - Sealed records <u>should not</u> be shared with <u>anyone</u> outside the Department (e.g., prosecutors & the media), except in statutorily limited circumstances. For further direction, contact the Legal Bureau.
<u>Juvenile Delinquents</u> (“JD”) 7 through 16 years old (beginning 10/1/18) 7 through 17 years old (beginning 10/1/19) - Offense: If adult, would be a crime	After JD fingerprints have been taken and forwarded to DCJS, they must be DELETED FROM AFIS.	- All photographs taken of JDs during arrest processing (including on Department phones) must be kept CONFIDENTIAL, separate and apart from adult photographs. - If photographs have been taken of a JD that has subsequently turned 21: → If he <u>HAS NOT</u> been convicted of a crime, all photographs must be DESTROYED upon notification from DCJS. → If he <u>HAS</u> been convicted of a crime, all photographs must be kept CONFIDENTIAL, separate and apart from adult photographs.	- Pursuant to the Family Court Act, all JD records are CONFIDENTIAL and <u>cannot</u> be shared with <u>anyone</u> outside the department (e.g., prosecutors & the media). - Additionally, JD records must be SEALED: → Always when the case ends <u>in favor of the JD</u>. → When a case ends <u>in favor of the prosecution</u> if a court, upon JD’s 16th birthday, has ordered sealing.
<u>Subjects of Juvenile Reports</u> 7 through 16 years old - Offense: Any	Subjects of Juvenile Reports are <u>not</u> fingerprinted. <u>See</u> P.G. 215-08	Subjects of Juvenile Reports are <u>not</u> photographed. <u>See</u> P.G. 215-08	- Who can access Juvenile Reports? → Juvenile Desk → Detective Bureau for investigation → Desk Officers exercising arrest discretion - Otherwise, Juvenile Reports and all other related records must be kept CONFIDENTIAL. - However, all Reports must be immediately DESTROYED: → Upon Subject’s 17th Birthday; or → Where an investigation reveals that the Report is unfounded.